FILED
MAR 12 1991
OFFICE OF THE CLERK

No. 90-1193

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A.P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT, Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Counsel of Record
John Eidsmoe
Jones School of Law
Faulkner University
5345 Atlanta Highway
Montgomery, Alabama 36193-4601
(205) 272-5820 Ext 152

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument 1

Conclusion 17

TABLE OF AUTHORITIES

FEDERAL COURTS

Abington Township v. Schempp
374 U.S. 203, 10 L.Ed.2d 844,
83 S.Ct. 1560 (1963) 17

Lemon v. Kurtzman
403 U.S. 602, 29 L.Ed.2d 745,
91 S.Ct. 2105 (1971) 16

Lynch v. Donnelly
465 U.S. 668, 79 L.Ed.2d 604,
104 S.Ct. 1355 (1984) 16

Marsh v. Chambers
463 U.S. 783, 77 L.Ed.2d 1019,
103 S.Ct. 3330 (1983) 16

McCollum v. Board of Education
333 U.S. 203, 92 L.Ed. 649,
68 S.Ct. 461 (1948) 5, 6, 15, 16

McGowan v. Maryland
336 U.S. 420, 6 L.Ed.2d 393,
81 S.Ct. 1101 (1961) 4

Zorach v. Clausen
343 U.S. 306, 96 L.Ed. 954,
72 S.Ct. 679 (1952) 4, 5, 6

OTHER AUTHORITIES

Holy Bible

Genesis 1 .....10, 11

Leviticus 19:18 7

Matthew 22:39 7

TABLE OF AUTHORITIES, cont'd

OTHER AUTHORITIES, cont'd

Richard John Neuhaus, The Naked Public Square: Religion and Democracy in America (Grand Rapids, Michigan: Eerdmans, 1984) 17

ARGUMENT

Respondents attempt to portray themselves as champions of religious liberty and parental rights. As they say on Page 10 of their Brief in Opposition,

> It may be that some of the people of Gravette want this program of religious instruction and would be content to default their power of choice to the authority of the state; however, at least three of them do not; they are the respondents in this case. Matters of religious preference ought not to be determined by majority vote of the school board; even less should the school board permit such matters of religious choice to be decided by "non-sponsored, non-funded, non-school, non-denominational" outsiders. In matters of religious belief, each person is a majority of one.

In reality, Respondents seek to stifle religious expression and foreclose parental choice. In a nutshell, their position is: We don't want the Storytime program for our child; therefore, no parent should be allowed to have the program for his or her children; therefore, we will use the power

of the Court to prevent Storytime from taking place.

Respondents "believe that they, as parents, have the principal responsibility of teaching values to their children... ." (Page 9). In fact, that is where the the responsibility lies in the Gravette Public Schools--squarely with the parents. No child is allowed to participate in Storytime unless his parent gives written permission. At the beginning of the school year, permission slips are distributed to the children to take home to the parents. If the parent does not want his child to participate in Storytime, he does nothing at all. If he does want his child to participate, he signs the slip and returns it. The fact that about ninety-six percent (96%) of the parents do sign and return permission slips, is evidence of the popularity of the program.

In the Gravette School District, "matters of religious preference" are not "determined by majority vote of the school board" (p. 10). Rather, the Gravette School Board--acting unanimously on all matters concerning Storytime--has decided to allow Storytime as a voluntary, non-sponsored, non-funded activity, recognizing that the Storytime program teaches values and cultural background that some--in fact, ninety-six percent (96%)--of the parents may wish their children to receive. Respondents would deprive these parents of that option.

Because of the demographics of the Gravette School District, bringing the children of the district together other than during school hours is unfeasible. The Gravette School District comprises several small towns separated by large rural areas. Seventy percent (70%) of the

Gravette Elementary School's 532 students ride the bus to and from school. If Storytime were held before or after school, these students who ride the bus could not participate. If the bus schedules were altered to accommodate Storytime, that would undoubtedly be viewed as an imposition upon those students who do not participate in Storytime. Accommodating those students whose parents want them to participate in Storytime by arranging the class schedule to allow released time for those who want to participate, is an accomodation of religion such as that upheld and even praised in McGowan v. Maryland, 336 U.S. 420, 6. L.Ed.2d 393, 81 S.Ct. 1101 (1961), and Zorach v. Clausen, 343 U.S. 306, 96 L.Ed. 954, 72 S.Ct. 679 (1952).

Respondents argue that the Storytime program is like that which was ruled

unconstitutional in McCollum v. Board of Education, 303 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461, in which the Supreme Court struck down a released time program. Respondents cite six factors which show state involvement and bring this case in line with McCollum:

> (1) Providing public school classrooms for religious instruction; (2) Conducting or permitting the Bible classes during the instructional day; (3) Using school resources to notify parents desire to have their children attend; (4) Monitoring and supervising attendance at the Bible classes to ensure that only children who have parental permission are attending; (5) Segregating those children who do not have parental permission and supervising them while the Bible classes are conducted; and (6) Arranging the instructional schedule to accommodate the presenting of Bible instruction by outside instructors. (p. 3)

In fact, all of these factors except (1) were present in the released time program in Zorach v. Clausen, which the Court upheld as a permissible accommodation of religion. The question

of whether the released time programs take place on campus as in McCollum, or off campus as in Zorach, is one relevant factor but not the only factor or the controlling factor in determining whether a released time program violates the establishment clause of the First Amendment.

Respondents claim that "in McCollum the ecumenical alliance that sponsored the religious instruction offered at least three points of religious view, while in the Gravette schools only one may be heard." (page 6). This is misleading. The Gravette School Board has repeatedly emphasized that if anyone wishes to conduct another program as an alternative to Storytime, the request will be handled on an equal access basis. The fact that in the fifty-two years Storytime has been in effect no one has requested an alternative, is evidence that the Storytime is broad

enough and nondenominational enough to satisfy nearly everyone. And once again, those who do not want Storytime for their children may simply not sign the permission slip and their children will not attend.

Respondents argue that

> ...a course of Bible instruction, such as the one at Gravette, that teaches the fall and depravity of man, the divinity of Christ, and the divine role of Jesus Christ in the redemption of mankind, does little to explain the Judaic roots of our common culture. The Jewish concept of individual responsibility for a just society springs from entirely different religious presuppositions than does the Christian idea of the Golden Rule. (page 8)

Petitioners do not accept Respondents' assertion that individual responsibility is inconsistent with the Golden Rule (page 8). In fact, Petitioners note that when Jesus commanded His followers that "Thou shalt love thy neighbor as thyself" (Matthew 22:39), He quoted from the Jewish law of the Old Testament (Leviticus 19:18).

One could characterize the Storytime program as narrowly Christian, only if one considers only the isolated segments of the program brought out by Respondents at the Preliminary Hearing July 31, 1989. These are only a few segments of a comprehensive curriculum that extends over a three year period. Characterizing this program as distinctively Christian also ignores the fact that two of the three years of the Storytime curriculum cover the Old Testament, and only one year covers the New Testament. While the record does not reveal whether any Jewish families reside in the Gravette School District, a Jewish parent could, if he chose, allow his child to participate in Storytime during the two years the Old Testament is covered, but not allow his child to participate during the third year while the focus is on the New Testament.

Respondents insist (p. 5) that the affidavit from Petitioners' attorney summarizing the proposed testimony of Drs. Burron, Moore, Doty, Berman, and Carnagey was incompetent as evidence. The affidavit was based upon lengthy interviews with each of these experts, both in person and by telephone; the time constraints for submitting the briefs made it impossible to mail the affidavits and have them returned in time for submission. Furthermore, Respondents failed to object to this affidavit until the case was appealed to the Eighth Circuit. If Respondents had objected at the District Court level and if the District Court felt that this objection was valid, Petitioners could, with the District Court's permission, have cured the defect by obtaining affidavits directly from the expert witnesses. By failing to object at the District Court level,

Respondents have waived their right to raise this objection.

Respondents claim that the Storytime teachers present certain Bible stories as "fact" (page 4). One of the ladies who teaches the Storytime program testified that she teaches certain items as fact, but the complex and repetitive nature of the questions leaves a genuine issue of material fact as to what that means. Does it mean she tells the children the stories are true? Does it mean she tells the children that she believes the stories are true? Or does it mean she tells the children that this is what the Bible says and leaves it at that?

For example, Genesis Chapter One says God created the universe in six days. What the Bible means by the word "day" is a question on which people may disagree. Whether the Bible is correct or incorrect

is again a question on which people may disagree. But that the Bible says the universe was created in six days is incontrovertible fact.

To determine how the teachers teach the Storytime program requires much more than repetitious and confusing questioning about a few isolated examples. It requires an examination of the entire program, and the District Court has not permitted such an examination. This is a genuine issue of material fact that has not been resolved.

Respondents also claim the Petitioners' (Defendants') motion for declaratory judgment was not appealed and is not before this Court. One basic issue raised by Petitioners, both to the Eighth Circuit and to this Court, is the overbreadth of the District Court's Order. The District Court's refusal to grant Petitioners' motion for declaratory

judgment is but one example of this overbreadth.

An injunction against a government body such as a school board should be narrowly drawn to prohibit only such conduct as is clearly objectionable. But in this case the District Court ruled that the Storytime program may not be used in the public schools during regular school hours because of a few isolated aspects of the program that could possibly be construed as an establishment of religion. The District Court refused to identify what portions of the program were and were not objectionable. The Court refused Petitioners' request that the Court issue guidelines as to what type of program would or would not be allowed. The Court refused, after Petitioners modified the program, to issue a declaratory judgment as to whether the Storytime program as

modified was or was not constitutional. Petitioners are thus in a quandary. They want to obey the Court. At the same time, they want to accommodate the desire of most of the parents and citizens of their school district to allow a program like Storytime to the extent the Court and the Constitution allow them to do so. As things stand now, Petitioners do not know what the District Court will or will not allow--and if they guess wrongly, they may face a contempt citation.

The District Court could have fashioned narrower relief. The Court could have delineated which features of the Storytime program are objectionable and ordered that these be modified or eliminated if the program is to continue on school premises. The Court could have issued guidelines so the School Board would know what would and would not be allowed.

After Petitioners modified the program, the Court could have ruled on whether the program as modified was or was not constitutional. But the Court refused to do so. The result is an overbroad order which leaves Petitioners uncertain what they may or may not allow. Unfortunately, the safest course of action may be to disallow the entire program. The result would then be that the children and parents of Gravette are denied access to a program that has benefitted the community for over half a century.

This case, then, gives this Court the opportunity to consider many important issues affecting education and religious freedom.

It gives the Court the opportunity to consider the extent to which the public schools may inculcate values, and the extent to which in doing so they may draw

upon the religious roots of those values.

It gives the Court an opportunity to consider whether the public schools may, by allowing Bible study as a non-sponsored, non-funded, voluntary activity, the public schools may allow Bible study that might not be allowed as part of the regular curriculum.

It gives the Court the opportunity to consider whether the fact that an allegedly religious activity occurs on school premises, should be the definitive factor in determining whether or not it is constitutionally permissible.

It gives the Court an opportunity to consider whether an on-campus program of Bible instruction could be effected consistent with McCollum. Petitioners have shown significant distinctions between McCollum and the Gravette Storytime program (Petition, pp. 25-27). Respondents

have attempted to belittle each of these distinctions individually. Petitioners maintain that these distinctions, considered cumulatively, make the Gravette Storytime program substantially different from McCollum.

It gives the Court an opportunity to consider whether the "Lemon" test is applicable to this type of establishment clause case. As former Chief Justice Burger noted in Lynch v. Donnelly, 79 L.Ed.2d 604, 104 S.Ct. 1355, 465 U.S. 668 at 679-80 (1984), the Lemon test is a useful tool in some cases, but "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. ...We did not, for example, consider that analysis relevant in Marsh v. Chambers, 463 U.S. 783, 77 L.Ed.2d 1019, 103 S.Ct. 3330 (1983)."

CONCLUSION

Nearly three decades have passed since this Court, in Abington Township v. Schempp, 374 U.S. 203, 83 Sup. Ct. 1560, 10 L.Ed.2d 844 (1963), prohibited the reading of the Bible as a religious exercise in the public schools. Partly because of local misinterpretations of this decision, the use of the Bible in the public schools has greatly diminished. The result has been the onset of "value-free" education and what Richard John Neuhaus eloquently describes as "the naked public square (Richard John Neuhaus, The Naked Public Square: Religion and Democracy in America (Grand Rapids, Michigan: Eerdmans, 1984).

During this time we have observed a dramatic increase in juvenile crime, juvenile promiscuity, teen pregnancy, teen suicide, drug abuse and the like, coupled

with an equally dramatic decrease in scholastic achievement. It would of course be presumptuous to say the removal of the Bible from public education is the sole cause of these subsequent developments. But it would be equally presumptuous to assume that these developments are totally unrelated.

The academic and moral education of children is incomplete without exposure to this Book that has been so central to the development of Western civilization. The Gravette Storytime program is a solution to this problem that merits more careful consideration than a mere summary judgment. Gravette wants its day in Court!

Respectfully submitted,

John Eidsmoe
Counsel of Record
Jones School of Law
5345 Atlanta Highway
Montgomery, Alabama 36193-4601
(205) 272-5820 Ext 152

CERTIFICATE OF SERVICE

I, John Eidsmoe, do hereby certify that a true and correct copy of the foregoing was mailed this 12th day of March 1991 to James Lingle and George Oleson, Attorneys at Law, P.O. Box 652, Rogers, Arkansas 72756

_____

John Eidsmoe